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United States District Court

Northern District of California

Before The Honorable William Alsup

Oracle America, Incorporated,	)	
Plaintiff,	)	
vs.	)	No. C10-3651 WHA
Google, Incorporated,	)	
Defendant.	)	

San Francisco, California
Thursday, July 21, 2011

Reporter's Transcript Of Proceedings

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(Appearances continued on next page.)

Reported By: ***Sahar Bartlett, RPR, CSR No. 12963***
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

Appearances,(continued:)

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Thursday, July 21, 2011 **2:01 P.M.**

P R O C E E D I N G S

THE CLERK: Calling civil action C10-3561, Oracle America, Inc., versus Google, Inc.

Counsel, can you please state your appearances for the record.

MR. JACOBS: Michael Jacobs, Morrison & Foerster, for Oracle.

THE COURT: Welcome.

MR. HOLTZMAN: Steve Holtzman, Boies, Schiller & Flexner, for Oracle.

THE COURT: Thank you.

MR. SARBORARIA: Matt Sarboraria, in-house counsel for Oracle.

THE COURT: Thank you.

MS. DEARBORN: Meredith Dearborn, Boies, Schiller & Flexner, for Oracle.

THE COURT: Welcome.

MR. VAN NEST: Good afternoon, Your Honor.

Bob Van Nest, Keker & Van Nest, for Google.

I'm here with my partners, Christa Anderson and Dan Purcell and Bruce Baber from King Spaulding.

And we have two Google representatives with us, Catherine Lacavera and Renny Hwang.

THE COURT: Welcome to all of you.

All right, we are here for a hearing on the damages study.

Mr. Van Nest, it's your motion, so please proceed.

I have about 55 minutes, total, and then a 3:00 o'clock calendar, so let's try to divide it roughly evenly.

MR. VAN NEST: Thank you, Your Honor. We appreciate very much your time, and I'll try to be brief in using it.

With respect to the Daubert, rarely have we seen a report that seeks so much based on so little. I'm going to concentrate on three critical flaws that I think should prevent this report, or the testimony that it represents, from going to the jury.

The first and most fundamental is, there is a complete failure to link the value of these asserted patents or copyrights to the damages analysis. Dr. Cockburn completely punts on that. He says throughout his report that someone else is going to do that.

When he gets to the critical factor in the ***Georgia Pacific*** test, he says, and I'll note this, it's from the Appendix C: "I understand that other witnesses may testify," may testify, "that the patents and copyrights are individually and jointly important but right now there is no clear economic basis at this point for apportioning the value of Android and the value attributable to these patents and copyrights."

Well, that exercise is, as Your Honor knows, now

required by the Federal Circuit. And that -- that requirement has increased in the last several years with the ***Uniloc*** case and the ***Lucent*** case and these enormous damage reports going in without any attempt to tie the value of the patents to the technology.

Now, we know --

THE COURT: It's more than that, it's the value of the claims asserted, not just the patents.

MR. VAN NEST: That's right.

THE COURT: I mean, a patent might have ten claims, and if only four are asserted, you got to laser-like zero in on those four. I agree with that.

And Mr. Jacobs, when it's your turn, you need to address that point. It's a good point.

Go ahead.

MR. VAN NEST: Couple points about these patents. We are still looking at 50 claims. We are still looking at seven patents, I'll talk about that a little later. These are 7 patents out of what Oracle claims are 2000 patents covering Java.

Now, of the seven --

THE COURT: I didn't hear that. That is a new piece of info. Say that again.

MR. VAN NEST: Oracle claims there are 2000 patents covering Java.

THE COURT: Where is that in the record?

MR. VAN NEST: I'm not sure it's in the brief, Your Honor. That's in material that they presented to us prior to the commencement of the litigation. And nowhere did Dr. Cockburn try to take into account the number of patents that even Oracle claims covers Java.

THE COURT: Well, but if it's not in the record, how can I rely on that?

In other words, you are making a potentially good point, but what am I supposed to cite in my order?

MR. VAN NEST: I'll take a look, Your Honor. It may well be in the record. It may well be in the record.

THE COURT: "May well be" is not the same thing as "is be."

MR. VAN NEST: I agree with you there.

Now, these patents, seven of them, so far, there is no testimony that any of them are significant to Java. Certainly, Dr. Cockburn doesn't cite any. We haven't seen an expert report that indicates that they're essential or nonessential.

Essentially, as I said, he doesn't promise that someone will say it, he promises that someone may say it. And unless and until someone says it, there is no basis for the damages analysis whatsoever, and the report fails.

The second point which I think Your Honor has

already recognized is that there is a complete failure to justify, including any Google advertising revenue whatsoever, in the royalty base. There has been no analysis whatsoever of the Entire Market Value Rule, as you noted in your order. The Entire Market Value Rule requires not only that they make a linkage between the asserted claims and the damages, but if they want the entire value of the product, and here we are talking about not only the value of the product, which is a handset, but then the advertising on top of that, you have to show that those features are the demand, they create the demand for the product, itself. Again, absolutely no showing of that here.

Obviously, Google earns ad revenue from many different types of products, mobile is a very small part of that. And Google earns revenue off many different mobile products: iPhone, Rim, BlackBerry, none of these are Android products.

Dr. Cockburn hasn't made any effort to show, let alone using Android, but stepping back from Android, linking up the value of these asserted claims, there is nothing in his report that gets anywhere near that. No showing, really, of a logical basis to believe that these tweaks, if that's what they are, in the Java virtual machine, which is really all they are ever claimed to be, could possibly have a relationship to what ad revenues Google, or anyone else, might earn from the variety

of handsets that handset makers have published. So that's the second flaw.

The third flaw, and this is really based on ***Concord Boat***, Your Honor, is that the report ignores undisputed market facts that we know are out there that are cited in Dr. Leonard's declaration and cited in our opposition that they just completely ignore.

Fact one is that they went to the federal regulators when Oracle acquired Sun and said that the totality of our revenues from handset makers, from handset makers annually, is a number in mid 8 figures. It may be a confidential number, so I don't want to put it on the record, but it's a mid 8-figure number for everybody. And by "everybody," I mean all the big boys: Nokia, Motorola, Samsung, Rim. He completely ignores the existence of these, which arguably, are the closest, most comparable thing to a license to an operating system for a smart phone.

Secondly, they went ahead and represented to the regulators, when Oracle acquired Sun, we have always licensed this technology, Java, we have never refused to license it, and we have always licensed it at diminimus rates, diminimus rates.

And yet, as Your Honor notes from Cockburn's opinion, he is talking about a deal wherein Google would agree, in a hypothetical negotiation, to share 15, 20 percent of its ad revenue on every handset using Google. Ridiculous.

He overlooks the actual negotiations --

THE COURT: Repeat that last point again about diminimus and -- say that again. Where did that come from?

MR. VAN NEST: Yeah, that came from Oracle's representations to the federal regulators when they acquired Sun. And there was an investigation into whether this was anti-competitive or not, that, hey, we have always licensed Java, we have never refused to license Java, and we have licensed it at diminimus rates.

And now you have Dr. Cockburn coming in here and claiming that in a hypothetical negotiation, Google would have agreed to pay 15 to 20 percent of all of its ad revenue off every handset sold by every carrier, not only using Android, but as I understand his report, every other platform as well.

Now, the actual negotiations, in the actual negotiations, Sun proposed a royalty all in for three years of a hundred million dollars, and that was rejected by Google. That was offered, according to Dr. Cockburn and according to the evidence --

THE COURT: Well, what difference does it make? Why does it matter if Google rejected it? Google may have been playing -- they may have just been trying to get it on the cheap, that doesn't mean it was reasonable to reject it.

MR. VAN NEST: No, Your Honor, Your Honor --

THE COURT: It may mean that the offerer was willing

to take a hundred million, but the rejection means nothing, does it? What could it possibly mean?

MR. VAN NEST: Well, it doesn't mean nothing, Your Honor, but your point is well taken; it probably means more that that's what Sun offered, that's what Sun was willing to take. In other words, in the hypothetical negotiation --

THE COURT: And then your side -- tell me why there isn't willful infringement here.

MR. VAN NEST: I will.

THE COURT: Because you went to get the license, you didn't follow through, and now you got a production out there that is in direct violation of these patents?

MR. VAN NEST: None of those.

THE COURT: That's a very hard scenario -- I am going to ask you, but I bet you've never seen that scenario before. I have not.

MR. VAN NEST: And you won't see it here, either, Your Honor.

THE COURT: Well, then, why isn't there willful infringement?

MR. VAN NEST: I'll explain why.

THE COURT: All right. Leave enough time.

MR. VAN NEST: The negotiation that took place was not a pure licensing negotiation. And that's been confirmed by all the participants, including Mr. Schwartz, the CEO of Sun at

the time.

Google had two essential options in building Android: They could have entered into a technology partnership with another company and contributed resources and engineers and built Android together, that's what they were discussing, in fact, with Sun.

They discussed that same thing, Your Honor, with several other companies that already had virtual machines. So they went to several companies, not just Sun, and said, do you want to build this project with us together? We'll provide engineers and technology, you provide engineers and technology, and we'll build the product together and the advantage of that was, it might be a little faster.

The other option they had was to build it on their own, build it independently and using their own engineers, own technology and/or licensing technology from other third parties, not -- not just Sun, because many other folks were building virtual machines.

What happened was, they couldn't come to terms with Sun -- by the way, in those negotiations, there wasn't any specific discussion of the patents. Nobody showed them Sun patents. Nobody said, are you infringing these patents. They didn't see these Sun patents until Oracle showed them to them a month before --

THE COURT: Why did they need their license, then?

MR. VAN NEST: They were negotiating a technology partnership, they were negotiating an agreement. They weren't coming to say, we need a license to your technology, they were coming to say, we have a product and a project we would like to build, we would like to build it together, you guys have technology that might be useful, we have technology that might be useful, let's partner together and build it.

And that is what was being proposed in 2005 and 2006 in these discussions we've been talking about. That was not acceptable, ultimately, either to Google or to Sun, they couldn't reach term on that. So Google went out, they built their own. They used a clean-room environment. They didn't look at any of these Sun patents we're talking about.

And the kicker is, Your Honor, discussions continued, there were further discussions; Sun became more and more and more interested in getting on the Android bandwagon.

So when Android was announced in 2007, Sun didn't throw up their hands and say, oh, my gosh, you're infringing, Sun congratulated Google on Android, welcomed Android to the Java community, put Android on Sun products, asked Google how they could help Android.

The whole point was that Android was something that Sun saw, then, as beneficial to them, something that would spread the news and the word about Java. They didn't come in in 2007 --

THE COURT: So you're saying that Android does not use Java.

MR. VAN NEST: I'm saying that Android does not use Java, that we are going to prove noninfringement, that Android uses the Java programming language, which nobody claims is protected by Sun.

The Java programming language, Your Honor, is the alphabet, the language that programmers use to write source code. That is open to everyone. And that is being used not only by Google, but by many, many others in the Java community, and nobody's claiming that that's infringement.

With respect to how the Dalvik virtual machine works and the Dalvik Java libraries that are used, those are original Google technology or licensed from third parties. Google has a license from the Apache Software Foundation. And they have a license to use libraries that the Apache Software Foundation created. And nobody's contesting that they have that license.

And, Your Honor, the proof in this is that when this thing was announced, and we just sat down with Mr. Schwartz yesterday, when Google announced Android in '07 and when they launched it in '08, the reaction from Sun was, welcome aboard, we want to work together, you are another way of spreading the Java programming language. We welcome you, we want to work with you, we want to be a part of Android.

There was never a threat of litigation. There was

never a waiving of patents. There was never a waiving of copyrights. All that started only after Mr. Ellison paid 7 billion for Sun and then turned around several months later and sued.

But at the time, the people running Sun, the people who had been in the negotiations, the people who were in direct contact with Mr. Rubin, the people who were talking with Google and who rejected this technology partnership, they didn't come after Google.

THE COURT: Well, what do they say now in their depositions?

MR. VAN NEST: Just exactly what I told you.

THE COURT: So at the time of trial, the former Sun executives are going to come in here and say there was no infringement?

MR. VAN NEST: They are going to come in here and say that they negotiated for a technology partnership, they hoped to be part of Android, it didn't work out. But that when Android was launched, they welcomed it, they publicly applauded it. They got aboard it. They said it can help us. They said it will help us sell our hardware, and --

THE COURT: What did they say about infringement?

MR. VAN NEST: Their view was that Google had built the Dalvik in a clean room, and they had a license from Apache. And Sun said, the Apache license gives them the right to use

the Apache code, and we are not going to sue for that.

And they didn't sue for that, they recognized the legitimacy of the third-party license that Google had. They recognized Google's right to publish its own product. They recognized Google's right to --

THE COURT: I don't know if this is true or not, but the allegation is made that you have hundreds of lines of code that came straight -- copyright -- exactly the same code that -- it belonged to Sun.

MR. VAN NEST: The allegation is not right. There are -- there are a few lines of code that are identical to Java code. And we are still investigating that, but it turns out that probably came from some third-party vendor that created it in either Russia or Eastern Europe, imported it in. We had asked for them to build a module, and that is how it got in there.

THE COURT: I got you off track.

MR. VAN NEST: Well --

THE COURT: We only have about five more minutes, and then I'm going to let you save 3 or 4 minutes for rebuttal. So I'll be quiet for five minutes --

(Laughter.)

THE COURT: I know what you have in your brief, you don't have to repeat it; I think it's important, though, that -- you have said a few things I haven't heard before, so

spend your time on those things you think you want to make sure that I have in mind.

MR. VAN NEST: Okay.

The other two things that I want to make sure you have in mind, Your Honor, are, one, it seems to me that the level of scrutiny that the Court should apply to this should go up when you are talking about a $6 billion damage report. It's not as though they threw a $250,000 report on the table. This report is going to be exceedingly confusing for jurors, especially if they would be allowed, through Dr. Cockburn, to present that large a number with this many flaws without a legal link to either the asserted claims or to the ad revenues.

And in your job as gatekeeper, it seems to me that job is even more critical and more important the larger the number is. And in terms of protecting both Google and jurors from the kind of confusion that could result from this sort of report, it's absolutely critical that you take a hard look at it.

Now, what are we asking you to do? We are asking you to strike this report based on all of the flaws that I've identified and any others the Court thinks are meritorious. We are not asking you to bar Oracle from presenting a report. They have expert report deadlines coming up on the 29th; they can redo a report following the principles of ***Uniloc***, and ***Panduit***, and setting forth the Entire Market Value Rule.

But this report should fall, this report should be stricken, and they should be advised that unless and until they come up with a report that meets the requirement of Daubert, they won't have any expert report at all.

THE COURT: Thank you.

MR. VAN NEST: Thank you.

THE COURT: I'll let you have about 4 or 5 minutes, Mr. Jacobs --

MR. JACOBS: Your Honor, Mr. Holtzman will be --

THE COURT: Very good.

Mr. Holtzman.

MR. HOLTZMAN: Thank you, Your Honor.

I actually, especially in view of the limited time, we have a binder for the Court I would like to hand up.

THE COURT: All right.

MR. HOLTZMAN: Hopefully some of which we will be able to actually get to. And it covers, Your Honor, each of the aspects of the hearing today. The Daubert issues are in the first tab, and then the Court asked a number of questions, and the second two tabs cover those.

I'd like to address, hopefully briefly, each of the points that Mr. Van Nest made, which I think also will cover the Court's questions in its previous orders. And I would like to do that, I think, in reverse order.

I want to start first with the willfulness issue.

It's interesting that in his presentation, Mr. Van Nest focused with regard to willfulness entirely on what Sun said, purportedly said regarding, you know, this issue of Android and how they reacted to it. The question with regard to willfulness, the question under the law of willfulness, is what Google knew and whether Google acted, despite an objectively high likelihood there was infringement.

THE COURT: What have you found in their files? I mean, in other words, do you have -- I saw that e-mail that you referred to, but it doesn't call out any patents. So do you have some e-mail inside their files that says one of these seven patents were be infringed?

MR. HOLTZMAN: We have -- not as to the specific patents, because, with all due respect, when you think about Google and what we were the thinking at the time, it's not like they went through each and every patent and the claim of the patent and said, oh, this one's a problem, this one's not a problem.

But, the evidence will show clearly and convincingly that before the infringement began Google said -- and we have documents on this -- Slides 67 through 70 in the binder. I don't want to discuss those documents at great length when the public's here --

THE COURT: You said it -- listen, there is no restriction. This is a public proceeding. And you lawyers and

the companies are not going to handcuff the public from knowing what goes on in its Federal District Court.

This is not a wholly-owned subsidiary of Oracle Corporation. So I'm going to have a public order. No one is going to put my order under seal, even if I refer to your secret documents. So you can say anything you want.

MR. HOLTZMAN: Okay, I completely agree, Your Honor. These are their designations and --

THE COURT: Fine, you say whatever you want.

If Google has a memo in their file saying, we are about to willfully infringe, there is no way I'm going to keep that secret from the public or the investing public.

MR. HOLTZMAN: Okay. Well, let me --

THE COURT: So you say whatever you want to say.

MR. HOLTZMAN: Absolutely. I appreciate that, Your Honor.

Let me summarize --

THE COURT: The same goes for Oracle.

MR. HOLTZMAN: Yep.

THE COURT: You don't want to get me started on this. You big companies do not own the U.S. District Court. So, yes, you can have your protective orders, but when it comes to a public hearing, I'm not going to have to resort to Morse Code to understand what you are trying to tell me.

MR. HOLTZMAN: Okay, Your Honor.

THE COURT: Go ahead.

MR. HOLTZMAN: Let me summarize them, in the interest of time, and they are in the slides that we present.

Prior to the time the infringement began, Google's executives recognized that Sun's intellectual property was, as they put it, critical and central.

THE COURT: Where does it say that? I didn't see that e-mail. "Critical and central"; where does it say that?

MR. HOLTZMAN: Okay, so, looking, for example, at page 67 of the binder --

THE COURT: Okay, let's look at that.

MR. HOLTZMAN: This is an excerpt from a document, not the actual document. I'll represent, of course, that it's accurate.

THE COURT: All right, okay, in 2005, Andy Rubin --

MR. HOLTZMAN: Yes.

THE COURT: -- "wrote to Larry Page, said Android building a Java OS, and they were, quote, 'making Java central to Android.' He proposed that Google obtain a license. My proposal, quote, 'is that we take a license.'"

MR. HOLTZMAN: And then --

THE COURT: And your point is, your argument, anyway, is, well, that's what they said, but they knew they needed a license, and they didn't get it.

Did they use the word "license"? I guess they did.

MR. HOLTZMAN: They did, absolutely did, Your Honor.

Perhaps the --

THE COURT: But wait a minute, Mr. Van Nest said it was not a license, that it was a joint venture.

MR. HOLTZMAN: Yeah, I wanted to address that because, of course, the discussions proceeded on a broader basis. But, again, as it relates to willfulness, the issue is what they thought they needed, what they thought was critical, what they thought was central, what they were willing to do, whether they were willing, in the words of another document, to position ourselves against the industry. That's on page 68.

Whether they are willing to make enemies along the way, that's on page 70, okay? And they did specifically use the word "license," it was an integral part of those discussions.

Perhaps the most telling example of this is in a later document --

THE COURT: Would you -- I want to stick with your 67, though.

MR. HOLTZMAN: Yep.

THE COURT: You use the word "critical," you put it in quotes, and you say,

"Mr. Rubin stated in a presentation to Google's executives, that a license from Sun was, quote, 'critical,' closed quote. So read to me -- but I want to hear it for

myself, read to me the wording.

MR. HOLTZMAN: The exact -- I do not have that. Maybe it can be pulled.

THE COURT: Maybe if you can pull it in time? I would like to maybe even see the document, that would be good.

MR. HOLTZMAN: Absolutely.

THE COURT: I would like to see what the document said.

MR. HOLTZMAN: We can, of course, submit them, Your Honor.

THE COURT: No, no, come to court next time prepared.

MR. HOLTZMAN: Okay.

THE COURT: Go to your next point.

MR. HOLTZMAN: Yeah. I wanted to, in the interest of time --

THE COURT: Dr. *[verbatim]* Dearborn is bringing forward -- all right, would you show that to the clerk and then let me see it.

(Handing up document.)

THE COURT: This does have the word "critical," but it doesn't have the word "license."

MR. HOLTZMAN: That page does not have the word, "license."

THE COURT: Why does your page 67 have the word

license on it when the word license doesn't appear on your cite?

MR. HOLTZMAN: It may be a different page of that document, Your Honor. I would have to look at it.

THE COURT: That's not so good. I think you should be more accurate next time.

MR. HOLTZMAN: The slide is accurate, Your Honor.

THE COURT: The word critical is accurate, but the word license is inaccurate. Just said, why do the deal; well, the deal could be a joint venture.

Earlier, you did have one that said license, so see if you can find that one for me.

MR. HOLTZMAN: Okay.

Well, in the interest of time, I'm not finding it at the moment.

THE COURT: All right.

MR. HOLTZMAN: Let me switch to another document. If you look at page 74.

THE COURT: All right, let's look at that.

MR. HOLTZMAN: It's a later document, Mr. Lindholm, at Google, and he states in the document.

"What we've actually been asked to do by Larry and Sergey" -- those are the cofounders of Google -- "is to investigate what technical alternatives exist to Java for Android and Chrome. We have been over a bunch of these and

think they all suck. We conclude that we need to negotiate a license for Java" --

THE COURT: That's a pretty good document for you.

MR. HOLTZMAN: Yes.

THE COURT: That ought to be, you know, big for you at the trial.

MR. HOLTZMAN: Yep.

So these are the kinds of evidence we focus on I think will show clearly and convincingly they knew they needed a license and acted despite that fact.

Now, let me go to the Daubert arguments. Now, Mr. Van Nest articulated three central arguments, he said. And the third, going in reverse order, he says that the report ignores undisputed market facts. Well, the first thing about this is that none of the things he then said -- he said three things, factually, about what Oracle said to the regulators, about the value of Java revenue from handset manufacturers, what Oracle said about always licensing at diminimus rates, and then they talk about ignoring the actual negotiations between the parties.

First of all, none of what he said is undisputed. In other words, he has his evidence, Mr. Van Nest has the evidence that he wants to focus on in terms of valuations or public statements. But he ignores the fact that Professor Cockburn describes at great length a corpus of evidence,

including some of the things they want to focus on, assesses it, and reaches a conclusion. Daubert is not a battle of experts, it's not about making -- resolving factual disputes, and these things are all disputed. So that is the first point.

The second point on this argument is the things that Mr. Van Nest pointed to: Oracle's statement about its Java revenue, Oracle's statements about its licensing practices and the actual negotiations between the parties, they are not comparable. These are things that under the ***Lucent*** case that Mr. Van Nest referred to are specifically to be viewed with skepticism. You can't just take these simple benchmarks and therefore transfer them over.

The licenses --

THE COURT: What did ***Lucent*** say that would make the actual -- let's say that Sun made an offer to license, just to make it simple, these seven patents for $100 million, let's say that; why wouldn't that be a pretty good comparable?

MR. HOLTZMAN: The -- the key fact here -- I mean ***Lucent***, the central teaching of ***Lucent***, of course, is that past licenses have to be comparable, they have to be on similar economic terms and under similar economic conditions.

The fact that --

THE COURT: Or you have to be able to adjust for it. I agree with that, it has to be comparable, but let's say that it involved more than these seven patents, let's just say it

was just a hundred million for these seven patents, why wouldn't that be comparable?

MR. HOLTZMAN: Because the conditions of those licenses, as Professor Cockburn discusses in his report at some length, revolve around the compatibility, the absence of fragmentation, the compliance with Sun's, at the time, technical compatibility kit that promoted the value of the Java platform in Sun's ancillary products, not destroyed it, not fragmented it, not forked it.

THE COURT: How do you then respond to Mr. Van Nest, who said as soon as this Android came out, the Sun executives, they didn't recoil in horror and say, my God, fragmentation, this is terrible, they applauded the product.

So why -- how can you now say through a hired expert -- how much is he being paid per hour, by the way?

MR. HOLTZMAN: He is being paid -- it's in his report, Your Honor.

THE COURT: How much is it? I'm just curious.

MR. HOLTZMAN: $700 per hour.

THE COURT: Somebody being paid $700 per hour, of course they are going to come in and -- but at the time, the Sun people said, this is great. They didn't say it was a terrible thing. They didn't -- who came up with the idea of fragmentation? That was after Larry Ellison bought the company.

MR. HOLTZMAN: Actually, that's not the case, Your Honor.

THE COURT: Well, then, tell me --

MR. HOLTZMAN: In fact, as Andy Rubin testified in his deposition, Google's Andy Rubin --

THE COURT: Yes?

MR. HOLTZMAN: -- in the discussions that the parties had regarding a license or a partnership or both, Mr. Rubin commented in his deposition that the Sun people were hypersensitive to fragmentation. This is before the infringement began.

Now, what the factual record -- what the evidence will ultimately show about what Sun executives said at the time is what the record will show. I would submit that that is not to be resolved at this juncture based on a report that was submitted 70 days before the end of discovery, before there is anything, any record developed at all. That's simply a factual dispute.

The actual negotiations, as well as the past licenses, have to be considered and adjusted for the fundamental differences between them and the hypothetical license which takes the infringement as it occurred.

THE COURT: So if --

MR. HOLTZMAN: And Professor Cockburn does that.

THE COURT: If -- here's what I don't get, though:

If the e-mail from the inside -- Google recognized that Sun was hypersensitive to fragmentation, why wasn't that sensitivity already reflected in the 100 million-dollar offer?

MR. HOLTZMAN: Because that offer, Your Honor, was an offer for an implementation of the intellectual property that would have promoted the value of the Java platform overall, not defeat it.

And Professor Cockburn goes through this and specifically addresses this issue. If you take the hundred million dollars, or so, that Mr. Van Nest talked about, and then you add onto that the value -- and this is -- this is evidenced in the contemporaneous documents that Sun had -- if you add the value that that deal in those terms would have generated for Sun, you get to a much, much larger number, a number over a period of a number of years that is similar to the $2.6 billion damages number.

Because on an analyzed basis, Sun showed that under that deal, guaranteeing compatibility, guaranteeing a lack of fragmentation, and sharing control, Sun would have generated in just a three-year period ramping up to almost $600 million a year in revenue. This is what was lost, in part, by Sun, as a result of the infringement.

THE COURT: Is there a single former Sun executive who you have found who will come forward -- who is not on the payroll, by the way -- who will come forward and say, oh,

fragmentation is terrible.

MR. HOLTZMAN: Absolutely, multiple ones.

THE COURT: Give me an example.

MR. HOLTZMAN: Fragmentation --

THE COURT: Somebody at Sun who can come and counter -- make a dent in the argument that when this product came out, Sun embraced it warmly and did not recoil in horror at the idea of fragmentation.

So tell me somebody who -- who is the first Sun executive not on the payroll who recoiled in horror?

MR. HOLTZMAN: Well, one of them, certainly, is Param Singh, who is now at Oracle.

THE COURT: He is where?

MR. HOLTZMAN: At Oracle.

THE COURT: But he is on the payroll; I'm talking about somebody who is not on the payroll or hired one of your retainers.

MR. HOLTZMAN: No, it's an employee.

THE COURT: Somebody who maybe today works for somebody completely different and has nothing to do with this case and has no axe to grind, the kind of people that juries tend to believe.

MR. HOLTZMAN: Absolutely, Your Honor.

So you are talking about former employees of Sun?

THE COURT: Former employees who were in a position

to know and would be willing to say, I've looked at this, I'm not being paid by either side, and fragmentation is going to ruin Java.

Who would that be?

MR. HOLTZMAN: I'm a little hesitant to call them out, Your Honor, but, for example, one --

THE COURT: I don't care if you don't want to tell me. Then that's your problem.

MR. HOLTZMAN: No, I appreciate that.

Rich Green, for example, now at Nokia, is somebody --

THE COURT: What's the name?

MR. HOLTZMAN: Rich Green.

THE COURT: Rich Green, all right.

What's he going to say?

MR. HOLTZMAN: I don't know if he will testify, Your Honor. It's up to him, essentially. We can subpoena him, but we haven't made all those decisions yet.

THE COURT: All right.

MR. HOLTZMAN: Kathleen Knopoff is another one, and she is also a former Sun employee.

THE COURT: All right, I've taken a lot of your time, and I want to give you some quiet time to make your points and without me interrupting you.

MR. HOLTZMAN: No, I appreciate that.

THE COURT: Please go ahead. I want to make sure that you have a chance to say the things that you want to make sure I haven't read yet. I've read a lot, but I want to give you that chance to make your main points.

MR. HOLTZMAN: I appreciate that, Your Honor. And there are, by the way, other former Sun executives in that category.

I think I've covered the third point that Mr. Van Nest made, his supposedly undisputed market facts.

Professor Cockburn's report discusses, and the record will show, that when you look at these facts, his facts as well as our facts, and you adjust for them properly, you get something that is extremely consistent with his damages number, okay?

Now, going to his second -- his second argument that the -- Professor Cockburn's report shouldn't have included, Android or Google advertising revenue in his damages analysis, Google's argument seems to be, and I think is, that there -- that damages should be zero in this case.

THE COURT: That's ridiculous, too. And we're not -- that's not going to happen, so you don't have to worry about that.

MR. HOLTZMAN: Okay.

So let me --

THE COURT: It's probably in the millions, I don't

know, maybe the billions, I'm not sure what it is. But zero is ridiculous.

MR. HOLTZMAN: Yep.

THE COURT: See, you are both just asking for the moon, and you should be more reasonable.

MR. HOLTZMAN: Yeah, but the issue on Daubert, Your Honor, is whether the methodology --

THE COURT: Yes, that's true.

MR. HOLTZMAN: And the use of the -- the way that Google monetizes Android, which is through advertising revenues, is consistent with the economics, and it's consistent with the law, and consistent with the --

THE COURT: Well, you don't sell Android as a product, right?

MR. HOLTZMAN: That's exactly right, Your Honor, but the way they --

THE COURT: So the way you make your money on it -- no, the way Google makes the money on it is, it has a value, Android has a value; how do we determine what that value is? Well, one way you would do that is to look at the advertising, the benefits, the advertising revenue that is attributable to it.

MR. HOLTZMAN: That's right.

THE COURT: Seems to me -- they are totally wrong on that.

MR. HOLTZMAN: Okay.

THE COURT: You don't have to waste your breath on that one, but you do have to waste your breath on a few other things.

MR. HOLTZMAN: Okay, and that's the last one I was going to get to.

THE COURT: All right, go ahead.

MR. HOLTZMAN: There is this is argument that there is a key failure to link the value of these patents to the damages, and this also --

THE COURT: You don't even know what patents you are going to assert.

MR. HOLTZMAN: Well --

THE COURT: You don't even know -- you can't even tell me now which claims you are going to assert at trial. And you want me to just gamble that whatever you decide on is going to be the Entire Market Value Rule?

MR. HOLTZMAN: Well, Your Honor, we have --

THE COURT: That is crazy, and you cannot get away with that.

MR. HOLTZMAN: Okay, well, we've asserted a number of patents --

THE COURT: You told me that -- you have gone from 123 -- you can't even make up your mind what is infringed. You go from 123, now you are at 50, and you are heading down to

somewhere below 25.

And now you want me to say, well, maybe, maybe we'll roll the dice and see if they can come up with some that translate to the Entire Market Value Rule, which is under attack in the Federal Circuit and is on its way out?

MR. HOLTZMAN: Okay --

THE COURT: Come on, I'm not going to do that.

MR. HOLTZMAN: Well, there are a lot of things in there, actually, I disagree with.

THE COURT: Well, you get to be the judge some day --

(Laughter.)

THE COURT: -- but right now I'm the gatekeeper. And that one you are going to lose on.

MR. HOLTZMAN: I appreciate that.

I do think the Entire Market Value --

THE COURT: You didn't even put in your report on that, you said somebody else is going to do that.

MR. HOLTZMAN: The Court asked our experts --

THE COURT: I said everything you have on damages.

MR. HOLTZMAN: Absolutely --

THE COURT: And this is part of it, and there is nothing there.

MR. HOLTZMAN: Your Honor, of course, we are prepared to supplement or fix, as the case may be.

THE COURT: I made a big mistake giving you this chance.

I went to this conference, Mike Jacobs was there; I was thinking, how can we make these cases more simple? Everyone in the room, Judge Rader, everyone, they were talking, these damages reports are out of control, we got to do something about it. And so I'm thinking, okay, maybe a way to do that is to let the lawyers submit their reports in advance, and then I can say this is good, this is bad, that's good, you know?

Instead, I get a report that calls for 6 billion, not million, billion dollars. You are never going to do it again. I'm never going to let -- the next time the lawyers are going to take the -- gamble everything, one shot. And if they lose it, they don't get a report. Just like Mr. Van Nest said, if you get greedy, it goes out the window, no more report, you just get an injunction, maybe.

MR. HOLTZMAN: Your Honor, the Court's case management order required, among other things, our experts to put in their report based on assumed fact scenarios. Now, there are two parts to the Entire Market Value Rule analysis. And by the way, this is a copyright case, too, Your Honor.

THE COURT: There is an assumption there. There is nothing in there but a guy who is being paid $700 an hour who comes up with $6 billion. Come on.

MR. HOLTZMAN: That's because the issue here of what --

THE COURT: He assumed every important point.

MR. HOLTZMAN: I don't think every important point.

THE COURT: What do I do? This is not a good way to run a railroad. Maybe I'm the one that is at fault.

You will get another chance, I'm going to give you another chance, but it was a mistake for me to do it this way. I should have just made you gamble on whether or not you would be too greedy, and if you were too greedy, you would not have a damage report, too bad for you.

MR. HOLTZMAN: No -- with all due respect, Your Honor, what we and Professor Cockburn are trying to do is comply with the Court's order.

The Court required us to put in our entire damages report, not our entire technical expert report, for example. The one issue here on which he says other witnesses -- and that is fact witnesses as well as expert witnesses -- may testify to is the specific extent to which the particular patents, the particular claims, delivers things like speed, memory, and security to Android. That's a highly fact-intensive, a highly technical inquiry.

Now, that is something that goes to liability as well as damages. A judgment call has to be made, Your Honor, as to whether that has to be in and whether an economist like

Professor Cockburn can competently do that. That's a judgment call that has to be made.

Now, he didn't omit everything, that is the one thing he did omit, and he deferred to other witnesses.

THE COURT: He didn't even tell what the claims were. He didn't even say what the claims were.

MR. HOLTZMAN: That's true, Your Honor, that's not his fundamental core expertise, that goes to liability.

What he did as an economist was address the demand question, he said once -- you take an assumed fact scenario that these claims of these patents provide speed, memory and security. He looked at the evidence, he discussed some of the evidence and said that is sufficient to form the basis for demand.

Now, also, there are copyrights at issue in this case. And by the way, the test is different under copyright. If we show -- they acknowledge in their reply brief a causal nexus, which doesn't mean forms the basis for demand, it means under the law of the Ninth Circuit that the copyrights materially enhance the value of the infringing product. Then you get direct and indirect profits as damages. And that can be in the form of reasonable royalty, or it can be in the form of the infringer's profits.

And in terms of the infringer's profits, which in their words are the lion's share of the damages in this case,

the damages analysis, it is Google's burden. It is not our expert's burden, it is not Oracle's burden to show under the Copyright Statute that the profits attributable to other -- that some of the profits are attributable to other elements of the infringing product. And that is an independent validation and justification of the approach that Professor Cockburn has here, both the reasonable royalty and the infringer's profits.

THE COURT: All right, thank you.

Mr. Van Nest, I have a question for you: When was that date of first infringement?

MR. VAN NEST: Well, if -- if --

THE COURT: Ah, ah, ah --

MR. VAN NEST: I would have to look back, Your Honor. The device was announced in '07. It was tested --

THE COURT: No, no, wouldn't the laboratory work --

MR. VAN NEST: Yes.

THE COURT: I will say this: It is not the date of first sale.

MR. VAN NEST: No.

THE COURT: That is wrong, that is wrong. Oracle is wrong on that. That only applies when it's being shipped into the country.

Somebody was using it in the lab or experimenting with it. So someplace you got to tell me, what was the date of

first infringement?

MR. VAN NEST: It was in 2006, is when they used the product in the lab. 2007 is when they announced a software development kit to the public, which would -- included the --

THE COURT: When did Oracle buy Sun?

MR. VAN NEST: 2010.

So if I can tie this together a little bit --

THE COURT: Go ahead. You have five minutes. Yes.

MR. VAN NEST: -- and respond?

I want to talk first about a question you asked Mr. Holtzman twice, and he didn't answer.

Where were the patents? Where is the memo about the patents? The answer is, the patents are not in Google's files. No one was shown these patents during the negotiations. Nobody -- there is no memo out there that says, oh, my gosh, we are infringing these Sun patents, there is none of that.

The first time anybody saw these patents is when the Ellison crew came in about a month before this lawsuit was filed and said, here are some Java patents, we think you are infringing, pay up.

So it is undisputed that there is nothing back in the files and nothing back in the records that anyone's turned up at this point. And discovery is almost over.

THE COURT: What do you say to this memo right here? I'm going to read it out loud, this is from Tim Lindholm:

"I, Andy" -- Andy; is he the president now? What is his job now?

MR. VAN NEST: It's Andy Rubin, Your Honor.

THE COURT: Yes. What's his job now?

MR. VAN NEST: Andy Rubin is still the head of Android at Google.

THE COURT: Okay, so he'll be on the hot seat at trial and have to explain this e-mail, which says in the second paragraph:

"What we have actually been asked to do by Larry and Sergey is to investigate what technical alternatives exist to Java for Android and Chrome."

MR. VAN NEST: Two points, Your Honor --

THE COURT: Wait, wait, wait.

"We've been over a bunch of these and think they all suck" -- that's a good technical term.

"We conclude that we need to negotiate a license for Java under the terms we need."

Okay, "license for Java"; well, that's -- okay, I agree with you, it doesn't say patents, but don't you think a good lawyer will convince the jury that that meant a license for patents and maybe for copyright?

But, I mean, how are you going to get around that?

MR. VAN NEST: Your Honor --

THE COURT: They -- you know what they used to say

about Joe Alioto? He needed -- you know, in a big case like this, he would come in, he only needed two documents: He need a document like this, the one I just read, and the Magna Carta, and he won every case.

And you are going to be on the losing end of this document, and with Andy Rubin on the stand.

MR. VAN NEST: Judge Alsup, there is --

THE COURT: You think about that.

And I want to say this: If willful infringement is found, there are profound implications for a permanent injunction. So you better think about that, and your client ought to think about that.

I'm not saying there was willful, but that is a serious factor when you are talking about an injunction. If somebody has willfully infringed, they had better be thinking about an injunction.

MR. VAN NEST: Your Honor --

THE COURT: So you -- so how are you going to get around this?

MR. VAN NEST: Number -- two points, two points.

Number one, this is August 2010, this is 2010. This is after the Ellison crew has come in, about a month before the lawsuit starts, and says, here's the patents, we think you're infringing, you should take a license.

So this isn't back in the day when they are working

on the project, this is not in '05, '06, '07, '08, this is 2010. I'm not sure this is even going to come into evidence.

These are negotiations by the parties --

THE COURT: Why were they looking for an alternative to Java, then?

MR. VAN NEST: Because if Oracle comes in and says, okay, you are going to have to spend all this money on a lawsuit, and we are going to seek billions of dollars, the question from the CEO is, is there any other way we can do this and avoid it, altogether?

Now, let me point out a couple of things. The alternatives we're talking about here might be simply alternative languages. And again, Mr. Holtzman didn't dispute that the Java programming language is open to everybody, open to everybody. You didn't hear him dispute that.

So what is happening in this e-mail --

THE COURT: Well, explain that part to me. Because you keep saying that, but weren't there -- wasn't it open to everyone, so long as there is no fragmentation, or so long as you use their kit? Is it really open to everyone, or were there conditions?

MR. VAN NEST: The programming language was open to everyone. You could use their virtual machine, if you didn't fragment. However, just yesterday, the boss -- you asked about third parties that have no axe to grind? The former CEO of

Sun, the guy making the decisions, said yesterday in deposition under oath, Android is not a fragmentation of Java, Android is a competitive alternative to Java. I regarded Android as a positive thing for Sun. I wish it had been more positive, he said, I wish it had been even more positive, they would have paid me a lot of money, but even as it was, it was a positive, and it is not fragmentation.

THE COURT: Okay, wait, wait, that's an important point.

Who said that?

MR. VAN NEST: Jonathan Schwartz, who was the CEO and president of Sun at the time, in 2007 and 2008.

THE COURT: Where is he now?

MR. VAN NEST: He's doing his own thing. He left Sun when Oracle came in and acquired because, as he put it yesterday, I thought they already had a CEO. So he is doing his own independent development. And he testified under subpoena yesterday and said Java is not -- excuse me, Android is not fragmentation.

But I want to come back to my --

THE COURT: I -- you said something -- I'm going to let you come back, but you also said something I want to make sure I grasp. You said that the Java software is open and unconditional, and it's only the virtual machine that has this kit; is that right? Did I --

MR. VAN NEST: The Java -- what I said was -- close. It's the Java programming language; the language that you write programs in is open to everyone. And not even Oracle disputes that.

THE COURT: Okay, wait a minute: Java program language open, unconditional.

MR. VAN NEST: Right.

THE COURT: And what is it, then, that is conditional?

MR. VAN NEST: What's conditional is, if you want to use Sun -- and many other companies developed a virtual machine and a series of code libraries, so let's call them the Java libraries and the Java virtual machine. Anybody can take a license to that, too. Anybody can take a license to that for free, nobody has to pay a penny for any of that.

But as to that, there are conditions. The condition is, if you take that license, which again, Your Honor, is open free of charge, if you add your own code to it, you have to make that public.

THE COURT: All right, I got that distinction.

MR. VAN NEST: Right.

THE COURT: So two parts: Does your Android use the Java virtual machine?

MR. VAN NEST: No.

THE COURT: All right.

MR. VAN NEST: It uses the Dalvik virtual machine.

THE COURT: All right, so let's assume that's right for the moment.

Does it use the code libraries?

MR. VAN NEST: It uses code libraries that are licensed from another party, Apache Software Foundation. It does not use the Java libraries, it uses --

THE COURT: Well, then, what part of Java do you use that you would need a license for?

MR. VAN NEST: None.

THE COURT: Then why did he write this memo?

MR. VAN NEST: Well, what they're saying is -- and again, this memo you are looking at is two weeks before the lawsuit starts: An alternative for us is take a license. That's an alternative, take a license to the whole thing, take a license to the code libraries and the virtual machine.

But what they have, and the reason Sun never sued them, was that when they published Android, when they announced it in '07 and launched the product in '08, they had a license from Apache to use the libraries, that's not in dispute.

They had developed their own Dalvik virtual machine, which now Oracle says infringes, but at the time, the position of Sun was, welcome to Java, welcome to the community, we want to work with you, I don't think you are a fragmentation, you are a competitive alternative. So that is from the number one,

that's the boss, that's the CEO that was running the company --

THE COURT: What is that person's name?

MR. VAN NEST: Jonathan Schwartz.

THE COURT: Is he the one you deposed yesterday?

MR. VAN NEST: Yes, he is, right, deposed under subpoena yesterday here in town.

THE COURT: Hmm.

MR. VAN NEST: So I want to go back to the --

THE COURT: You got two minutes.

MR. VAN NEST: Two minutes.

Couple of other key points. One, they simply can't get over the hump on the Entire Market Value Rule. They made no effort to link the asserted claims to any damages. They can talk about Java all day, they can talk about Android all day, but until they start talking about the claims they are asserting, even all 50 of them at this point, they don't have a report that passes Daubert under ***Uniloc*** or under the Microsoft ***Lucent*** case.

The other point I want to make is, he said that the facts I gave you were all disputed, but then he didn't dispute any. In our brief at page 5, we recite all the statements that I cited to you, Your Honor, that Sun made and Oracle made to the SEC when they got approval for this deal.

Number one: We are not aware of any instances where we have refused to license the technology.

Number 2: In licensing the entire system, not just seven patents, the entire system in 2008, Sun charged a diminimus percentage of software revenues, diminimus.

Third statement: They said a projection for fiscal year 2011 shows that with respect to all our significant handset licenses, all of them, Nokia, Samsung, LG, Motorola, they are going to generate a total of less than $70 million. That's everybody, not just Google, not just Android, that is the whole handset community.

So he said they were disputed, they are not disputed. They were in our brief. They haven't disputed them at all.

So the other point that I want to make is that if the big issue here is fragmentation, and you kept asking, who is going to come in, who is going to come in, who is going to come in: The guy in charge of this operation at Sun believed in 2007 and 2008 and 2009 and 2010 and yesterday that Android is not a fragmentation, Android is practicing using the Java programming language with a proper license from Apache for the libraries and its own Dalvik virtual machine.

And that is why in his view it was a good thing, not a bad thing for Sun, and why he made the decision in 2007 and 2008 not to assert any patents they had, because this was a good thing, not a fragmentation.

THE COURT: Which -- the other side contends that

there is fragmentation; does Oracle contend that the Dalvik virtual machine is fragmentation?

MR. VAN NEST: They contend that Android is fragmentation. They say that the Android system, because it's not completely compatible with Java, is fragmentation.

That's what they say, they say that it's fragmentation. I say it's -- it uses Java programming language, and it uses technology built by Google or licensed properly from third parties; therefore, it doesn't infringe.

So our position is going to be, and will be, there is no infringement, there's no willful infringement. There is still nothing in the record that shows Your Honor that at the time Google was developing Android, at the time they announced Android, or in 2008 when they launched Android, anybody had shown them these Sun patents or anybody was aware of these Sun patents or anybody inside Google thought they were infringing.

It's a little hard to imagine that when you announce your product, and the guy at Sun says publicly on a blog, at a conference, and in countless interviews -- it's not just what he says now, he said it in interviews, he said it on blogs, he said it at conferences, he said it to anybody that would listen: We welcome Google and we welcome Android to the Java community. Android is a pair of rockets strapped to Java. It is a set of rockets that is going to take our Java community even higher. It is 180 degrees --

THE COURT: Is that your term or his term?

MR. VAN NEST: That's his term.

THE COURT: Pair of rockets; kind of like the Space Shuttle.

MR. VAN NEST: Kind of like the Space Shuttle.

THE COURT: You know, you could have -- at the trial, you can have the --

(Laughter.)

THE COURT: -- Space Shuttle going off with the two rockets, that would be a good graphic.

I need to ask the other side a question, if you don't mind.

Assume for the sake of argument -- I know you contend that this did not occur, but I would like to know what you would say in this event: Let's say someone like Google, but not Google, had used just the Java program language and nothing more; would that be a violation of any of your rights?

MR. HOLTZMAN: It would not, Your Honor, but --

THE COURT: All right.

MR. HOLTZMAN: But the fundamental point is --

THE COURT: Wait, wait, wait.

MR. HOLTZMAN: Okay.

THE COURT: So my next -- if somebody came up with their own virtual machine, would that be a violation of Java?

MR. HOLTZMAN: It might or it might not. In this

case, it is.

THE COURT: Let's say that they used the Java programming language, which you say is not a violation, and they come up with their own independent virtual machine that is different from the virtual machine that Java has, so I guess, theoretically, a virtual machine, even if you independently developed it, might happen to infringe somebody's patent: Is that your theory, that they went into the clean room and just happened to solve the problem the same way as your patent?

MR. JACOBS: Can I cover this, Your Honor?

THE COURT: Yes, of course.

MR. JACOBS: No, it's more than that, Your Honor.

THE COURT: Go ahead.

MR. JACOBS: It started out with Java, it was Java through and through. And then they decided to do some renaming, and they decided to add another layer. And so the basic architecture was retained. It was retained with --

THE COURT: But you admit that the Java programming language is open to anybody.

MR. JACOBS: Yes. You and I can program in Java, and we are not infringing anybody's --

THE COURT: But so could Google.

MR. JACOBS: But they didn't stay in just programming in Java, Your Honor, they adopted the entire architecture.

So actually, and in Android, for example, if I go out and I write an Android application, I compile it in a Java compiler, I output Java byte code at the next level down.

And they stuck on another layer and do a translation into what they call dex code. And then they have a virtual machine for an Android's world: Write once/run anywhere, and by copying that architecture, our position is they --

THE COURT: Wait, wait.

Is the patent on the architecture?

MR. JACOBS: There are patents -- no. There are patents on the patented technologies.

Our testimony will show, the Google documents that we will adduce will show, that once they went down that path, in order to get satisfactory performance, in order to get satisfactory memory usage, in order to provide satisfactory security options to the Android community, they had to adopt these technologies. That will be our position. That will be our evidence. That will be our expert's testimony.

And that will come in on the 29th, in part, and then we will have Google witnesses on the stand at trial. And we will ask them, why did you adopt this technique? And we will hold them to their public announcement that says, we adopted this technique in order to achieve satisfactory performance. That is what will happen at trial.

And that is why our view is, on the fundamental

factual questions that underpin our Entire Market Value Rule, we'll make our showing.

THE COURT: All right, time has run out. It's a very interesting problem.

I'm going to get an order out soon, so that's the best I can say to you. And thank you for your hard work on this. A lot of brains -- a lot of talent out there, is what I mean to say.

Thank you.

MR. JACOBS: Thank you, Your Honor.

MR. VAN NEST: Your Honor?

THE COURT: Yes?

MR. VAN NEST: You asked us for a status report on --

THE COURT: I did. I read your information on that.

MR. VAN NEST: Do you need any further comment?

THE COURT: I may -- I have some thoughts in mind. And it was very useful to read your report, but I don't need to take up your time.

MR. VAN NEST: Thank you.

THE COURT: But I may have a supplement on that point. Thank you.

MR. VAN NEST: Appreciate it.

MR. JACOBS: Thank you, Your Honor.

(Proceedings adjourned at 3:10 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar Bartlett, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar Bartlett

Sahar Bartlett, RPR, CSR No. 12963

Friday, July 22, 2011